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# **CHAIR'S LETTER**

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It has certainly been an eventful beginning to 1998! The International Law Section continues with numerous activities. We have adapted our various programs to meet the current fiscal uncertainty in the face of the Governor's veto of the fee bill late last year.

#### **INTERNATIONAL LAW WEEKEND 1998**

Our flagship event, the International Law Weekend held each year in San Francisco, is on course, in co-sponsorship with the Intellectual Property Section of LAWASIA, an organization of various Pacific Rim Bar Associations. Professor John (Jack) McDermott, the program Chair, has been the driving force behind all the negotiations and arrangements. His boundless energy and optimism are key to the success of this program.

The fiscal crisis in the State Bar pales in comparison to Asia's current financial woes. We are doing all in our power to encourage attendance by LAWASIA members. There is a pending application to the United States Information Agency (USIA) for sponsorship of qualifying delegates under the Agency's exchange program.

It looks like we may have a sell out of this outstanding program. PLEASE make your reservations AS SOON AS POSSIBLE so that you will not be disappointed. For program times, locations and other details, please refer to the information contained in this newsletter.

#### STRESSBUSTERS WEEKEND

The weekend of March 13–15, 1998 at The Palms Spa in Palm Springs was again a great success. The participants relaxed, exercised and learned. Everyone enjoyed the experience. If you were not here, watch for this program when it is next offered. It is very worthwhile. Special thanks to Susan Liebeler and Linnet Harlen for doing an outstanding job.

#### **MCLE PROGRAMS**

Michael Tyler, our Vice-Chair and Chair of Programs, has been busy coordinating speakers and programs for the Education Institutes and for the Annual State Bar Meeting. If you have topics or speakers that you think would benefit our section's participation, please contact Mike.

#### **PUBLICATIONS**

The Practitioner, edited by Lowell Brown, is in need of quality articles. Here is an opportunity for you or a colleague to be published in our prestigious biannual journal.

*Newsletter.* Tom Bennett as Editor takes great pains to bring you a quality publication. You can help by submitting short articles of interest to international lawyers to him, and by purchasing advertising.

#### THE FUTURE OF THE INTERNATIONAL LAW SECTION

Twenty-one applicants for the too few committee membership positions available for the next term expressed their confidence in the ongoing work of the International Law Section. This is one of the highest number of applicants received over the past several years.

We considered these highly qualified individuals for positions as members and advisors of the International Law Section Executive Committee during April 1998. After approval by the State Bar Board of Governors, successful applicants should be notified during August of this year. Your Executive Committee had great difficulty in making this selection from this talented group.

International Law Section membership renewals are slightly down from last year. I have written individually to each person who did not renew Section membership and again encourage those attorneys to rejoin our Section for the upcoming year and receive the valuable benefits of membership. The cost for California based attorneys is only \$45. The State Bar has confirmed that these incoming funds will always be available to our Section.

The fate of the Bar and the fees issue remains in the hands of the California Legislators. There are competing and amending bills which are proceeding through the various stages of legislation. Updates on the progress of the bills are published in the monthly California Bar Journal and on the Web at <a href="www.calbar.ca.gov">www.calbar.ca.gov</a>. Also see our own web site at <a href="www.calbar.org/ils">www.calbar.org/ils</a> for the latest information on our Section.

In the meantime, the Council of Section Chairs, with the blessing of the President of the State Bar, are forging ahead to ensure the ongoing existence and work of the Sections, irrespective of the final legislation. We will not let our years of effort go to waste. I am committed to the ongoing and continued success of the International Law Section. Your Executive Committee is making an all out effort to provide the planned programs for the benefit of you, the members.

The State Bar has confirmed that it is obliged to provide the support service for which we have paid through the end of this year. As a back-up solution, a non-profit mutual benefit corporation is being considered with the help of the Tax and Business Law Sections. In fact at time of writing bylaws are being drafted for this corporation. The new corporation will be the umbrella organization for all the sections.

## Conclusion

Your Chair and your Executive Committee are working very hard, under difficult conditions, to continue to provide you with value as a member of the International Law Section. I appreciate your continued support.

Sincerely, David Hirson, Hirson Wexler Perl & Stark Chair, International Law Section

Note: The contact information of each of the persons referred to above is printed elsewhere in this newsletter.



Section Activities

# PLANS FOR THE INTERNATIONAL LAW WEEKEND NEARLY COMPLETE

Although the start of the International Law Section-LAWASIA Intellectual Property (IP) Law Conference is almost two months away, final plans are nearing completion for this historic event—the first LAWASIA-sponsored Conference to be held outside the Asia-Pacific region. 1

As a result of LAWASIA's sponsorship and the involvement of other organizations, the traditional International Law Section Law Weekend has become a Law Week. Although the IP Conference does not formally begin until Thursday, July 30, International Law Week activities begin on Monday and Tuesday, July 27–28 when the World Intellectual Property Organization (WIPO) holds its annual Arbitrator's Workshop in San Francisco in Conjunction with the ILS-LAWASIA IP Conference. The next event is a guided tour of the Silicon Valley on Wednesday, July 29, organized and sponsored by the University of Santa Clara Law School.

The IP Conference begins on Thursday, July 30. The scheduled keynote speaker is David Andrews, Legal Advisor to the Secretary of State.

The Conference features a wide range of knowledgeable and experienced speakers from prominent law firms, successful IP companies and major law schools. In addition to these "domestic experts," there will be approximately 20 speakers from throughout the LAWASIA region and several more from Europe. Also participating in the Conference will be 70-100 foreign lawyers and judges enrolled in the U.C. Davis Orientation in USA Law program—a truly impressive array of experts from around the world.

Individual sessions are devoted to the following topics:

- Protecting IP Rights from Infringement Abroad
- Arbitration of Intellectual Property Disputes under the New ICC Rules
- Making Entertainment a Business Internationally
- The Internet
- Protecting Trademarks Around the World
- Patent Enforcement Strategies in the Pacific Rim
- Financing the Development of Intellectual Property
- Export Control Policy in the Cyberspace Age
- Recent Developments in IP Law in the Pacific Rim

A reception, hosted by Skadden, Arps, Slate, Meagher & Flom, will be held Thursday evening for all Conference participants. A luncheon banquet will be held on Saturday, at the close of the San Francisco portion of the Conference.

But there is more! The final event of the International Law Week is a guided tour of the California Wine Country

featuring a stop at the historic village of Sonoma, before proceeding through the beautiful Sonoma Valley to the Jordan Winery in Healdsburg. Following a 90 minute program on the Use of Geographical Indicators in Wine Labeling and a tour of the winery, participants will enjoy lunch at Jordan's French-style chateau. The Tour will proceed through the Alexander Valley to Calistoga and then traverse the Napa Valley with afternoon wine tasting at another famous California winery.

This Conference creates a unique opportunity for California lawyers to acquire practical information from internationally recognized experts about how to protect their clients' intellectual property throughout the Asia-Pacific region and to meet and get to know practicing attorneys from the Asia-Pacific region, attorneys with whom they can expect to interact into the next millennium.

<sup>1</sup> LAWASIA holds its Biennial Conference at different locations in the region; the first was held in Kuala Lampur, Malaysia in 1968, the most recent in Manila, Philippines in 1997. Other Biennial Conferences have been held in Jakarta, Indonesia; Tokyo, Japan; Seoul, Korea; Colombo, Sri Lanka; Bangkok, Thailand; New Delhi, India; Hong Kong; Perth, Australia; and Bejing, PRC. The 1999 Biennial Conference will be held in Seoul, Korea.

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<sup>2</sup> Other law firm sponsors include Morrison & Foerster; Winston & Straw; Heller Ehrman White & McAuliffe; and Sheppard, Mullin, Richter & Hampton. <u>Back to Article</u>



# **IMMIGRATION LAW UPDATE - WINTER 1997**

David Hirson, Esq. & Catherine L. Mayou Hirson Wexler Perl & Stark Los Angeles, Irvine, San Diego, Phoenix, Las Vegas & China

- Immigrant Investor Visa Controversy
- H-1B Cap Crisis
- New Form I-9 Available for Review and Comment

## **Immigrant Investor Visa Controversy**

On December 19, 1997, the Immigration and Naturalization ServicesÕ (INS) Office of General Counsel issued a 36-page legal opinion regarding the legality of certain types of business arrangements for immigrant investor petition purposes. This opinion proposes drastic alterations to the existing regulations, and to the approach taken by the INS in adjudicating these petitions for the past eight years.

The Office of Programs, relying heavily on the General Counsel's opinion, recently issued a field memorandum (dated March 11, 1998) alerting all Service Centers and Districts to hold certain immigrant investor petitions, to prepare certifications to the Administrative Appeals office and to prepare for the return of certain immigrant investor petitions from U.S. consulates abroad. The Department of State has issued a similar directive to all diplomatic and consular posts, directing posts to return certain petitions to the Service Centers in the U.S.

Immigration attorneys and some members of Congress have criticized the General Counsel's opinion on the ground that it is not legally sound as the proposals outlined in the opinion have retroactive effect. This also constitutes an attempt to change regulations without following the Administrative Procedures Act (APA).

Under the existing §203(b)(5) of Immigration and Nationality Act (INA), an alien may qualify for an immigrant visa if he or she is seeking to enter the United States to engage in a new commercial enterprise in which the alien has invested one million dollars (or less, in certain "targeted areas", which will benefit the United States and create full-time employment for at least 10 U.S. workers.

This visa category was introduced in 1990, and the INS published regulations implementing the investor provision in December 1991. The INS' regulations at 8 CFR §204.6 stipulate the legal requirements for prospective immigrant investors: An investor is required to show an "actual commitment" of the required amount of capital, which investment may not amount to any kind of debt arrangement—a contribution of capital must amount to an equity investment. Similarly, the regulations require that the investment be genuine—the petition must therefore be accompanied by evidence that the required amount of capital has been placed "at risk" for the purpose of generating a return on capital. The regulations list acceptable evidence of the above as including bank statements showing amounts deposited in the enterprises' business account; evidence of assets which have been purchased for use in the United States enterprise; evidence of any loan or mortgage

agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner.

The controversial opinion from the Office of the General Counsel focuses on certain business arrangements that it identifies as involving serious questions of legality. The opinion lists several business plans that it argues are structured in such a way that only a small sum actually reaches the enterprises' business operations and, in addition, appear to give the investor relatively risk-free debt interests, rather than equity interests in the new enterprise. Among the business arrangements blacklisted by the opinion is the use of a cash investment counting for a portion of the full investment amount, the balance of which is made up by a promissory note that is secured by assets of the investor.

Business mechanisms such as these are standard prudent commercial practices, that are designed to protect investors from financial ruin, and are perfectly legal under the existing law. The original Congressional intent that led to the introduction of the investor visa category was the recognition of a vehicle that would encourage foreign investment and employment creation, and thus the question of whether the investor would actually lose his or her investment or suffer financial ruin, is irrelevant.

Even more sinister is the proposition that petitions containing such business arrangements that have actually been approved by the INS can now be revoked. Certain Congressmen and women are particularly troubled by the proposed retroactive effect, particularly since the INS has consistently dealt with such petitions over a period of time, by following its regulations which provide for the use of such business plans in investor petitions.

Until recently, the investor visa ("EB-5") program was a relatively unknown and underused provision of the law. There is an annual cap 10,000 available immigrant investor visas; however, in fiscal year (FY) 1996, only 936 individuals were granted EB-5 status. The INS is still compiling usage numbers for FY 1997, but it appears that as of January 1998, there were already 500 investors waiting to have their petitions adjudicated by the INS.

The only way to encourage the increased use of this visa category is for it to make business sense from the prudent investor's perspective so that the national interests of increased foreign investment and employment creation are served.

#### H-1B CAP CRISIS

An H-1B visa is the vehicle of choice for high-tech and specialty occupation employers to bring foreign professionals into the United States to work for them on a temporary basis.

However, there is a cap of 65,000 H-1B visas available during a fiscal year, and the INS is expected to announce in the Federal Register on May 12, that the H-1B cap for fiscal year 1998 has been reached.

Many U.S. companies are faced with a severe shortage of high-skill labor, and this constitutes a serious threat to their competitiveness in the global "Information Age" economy. Recognizing this problem, the Senate has introduced a new bill that would raise the H-1B cap as a short-term solution to current U.S. labor shortages, and introduce U.S. educational improvements as a long-term solution. The Senate is expected to vote on the bill, S. 1723 American Competitiveness Act, at the time of going to press. The House Judiciary Committee has introduced a companion bill, H.R.3736 "The Workforce Improvement and Protection Act of 1998," which is expected to be marked up by mid-May. The House's bill proposes an increase in the H-1B cap, but it also contains features such as layoff and recruitment attestations, enhanced Department of Labor investigative authority and enforcement which, due to the fact that these features are not included in the Senate's bill, could significantly delay the legislative process.

If the annual cap is not increased soon, major companies will be suffering labor shortages for four months, until the commencement of the next fiscal year, October 1, 1998, when the H-1B visa allotment for fiscal year 1999 starts to run.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) amended existing law by eliminating certain documents currently used in the employment eligibility verification (Form I-9) process. This rule proposes to shorten the list of documents acceptable for verification. Currently, newly hired individuals may choose from among 29 documents to establish their identity and eligibility to work in the United States. The proposed rule cuts that number approximately in half. In addition, the rule clarifies certain aspects of the verification procedure such as the receipt rule, the correct time for completion of Form 1-9, and details concerning reverification requirements. The new employment eligibility reverification form (Form I-9A) and instructions thereto, is now available for public comment.

For more information contact David Hirson at 949/251-8844, e-mail hirson@hwps.com.



Current Developments

# **NEWS FROM AROUND THE WORLD**

Editor: John J. Stifter

Student Reporters:

- Christopher Martin/UCLA Law School
- Susan Andrews/Southwestern Law School
- Fabienne Struell/Southwestern Law School
  - Amber Fitzgerald/Whittier Law School
- Public International Law
- Foreign & Comparative Law
- Law of the Sea

#### **PUBLIC INTERNATIONAL LAW**

# **Supreme Court to Decide Foreign Fifth Amendment Protection**

The U.S. Supreme Court has decided to resolve the issue in U.S. v. Balsys of whether a person who fears prosecution in a foreign country may invoke Fifth Amendment protections. The dispute originated when the U.S. Justice Department attempted to interview Aloyzas Balsys regarding his WWII activities. Balsys refused to respond, and invoked Fifth Amendment privileges based on his possible prosecutions in Lithuania, Israel and Germany. Balsys was ordered to testify by a federal court, but the Second Circuit, U.S. Court of Appeals ruled that if a person has a real and substantial fear of foreign prosecution, the Fifth Amendment can be invoked. The Eleventh Circuit held the opposite in a similar case last year and ruled that the Fifth Amendment protections may not be invoked. The Supreme Court is expected to decide this issue before July.

# **NATO Arrests War Crime Suspect**

NATO peacekeeping troops recently arrested Goran Jelisic, which is the third arrest in the last several months. Jelisic is known as the "Serb Adolf" and he would often brag about the murders he committed. Jelisic pled not guilty to genocide of Muslims, crimes against humanity, grave breaches of the 1949 Geneva Convention and violating the laws of war. In July 1995, Jelisic had been indicted for these crimes. Currently, there are over fifty publicly accused indictees and more indicted under seal.

# **Judge Releases War Crimes Indictee**

A Federal District judge in Texas released Elizaphan Ntakirutimana, a suspected Rwandan war crimes suspect, and stopped his extradition proceedings. Ntakirutimana was arrested in Texas by federal agents and was in the

process of being extradited to Tanzania to face allegations that he led armed Hutus to a Tutsi hiding place for a massacre. The Texas judge ruled that the 1996 agreement between the United States and the Rwandan tribunal to extradite is unconstitutional absent a treaty approved by the Senate. Thus, because no treaty between the U.S. government and the tribunal exists, the judge ruled that U.S. government may not extradite an indictee to the tribunal.

## **Royal Dutch Petroleum Faces Continuing Lawsuit**

The Center for Constitutional Rights ("CCR") in New York and other counsel filed a suit against Royal Dutch Petroleum (RDP) alleging its collaboration with the Nigerian military regime in summary executions and other crimes against humanity. These violations occurred when RDP requested help from Nigerian special forces to halt local anti-RDP protests. The suit specifically alleges that these abuses were accomplished with the support and knowledge of RDP. CCR bases its complaint on numerous international covenants, U.S. precedents such as Filartiga v. Pena-Irala and Nigerian Common Law.

# **World Court Accepts Jurisdiction of Libyan Case**

The World Court accepted jurisdiction over the Pan Am Flight 103 case on February 27, 1998. In that case, the United States and Britain identified two Libyan suspects as having planted a bomb aboard the flight which killed all passengers. The United States and Great Britain argued to have the Libyan agents extradited to the United States or Britain. Libya asserts that the 1971 Montreal Convention against terrorism in aviation applies and permits their country the right to try the suspects. The Court, in a preliminary ruling, held in favor of Libya. The two suspects will most likely go to trial in a neutral country.

# **New Privacy Guidelines by OECD for E-commerce**

The Organization for Economic Cooperation and Development ("OECD") recently met in Paris to focus on the need for regulatory guidelines for privacy protection in the online world. These considerations parallel concerns of the Clinton Administration regarding easing restrictions on export of encryption products which could compromise privacy and security of electronic communications. Senator's McCain and Kerrey plan to introduce an amendment to the "Secure Public Networks Act" to establish an advisory board comprised of government and private sector experts to regulate encryption exports.

## **Inspection of Super Computers for Military Use**

The National Defense Authorization Act for Fiscal Year 1998 ("NDAA") was recently signed into law. NDAA contains a provision requiring the Commerce Department to perform "post-shipment" inspections in approximately 50 countries, such as Russia, China, and India. Such countries are considered to be at risk of using high-performance computers for military purposes, in violation of U.S. laws. Such inspections are difficult to perform because of limited resources and the reluctance of certain governments to allow such inspection. Trade with China could be disrupted because it prohibits these inspections. The NDAA also requires companies to notify the Commerce Department of their intention to export high-performance computers to so-called Tier III countries, in order to determine if an export license is necessary.

## **UN Pressures Yugoslavia over Kosovo Unrest**

The United Nations Security Council voted to impose an arms embargo on Yugoslavia. The vote is seen as a largely symbolic move to pressure Yugoslav president Slobodan Milosevic to actively pursue a peaceful solution to tensions with the ethnic Albanian majority in the Serbian province of Kosovo. Violence in Kosovo has flared since President Milosevic revoked Kosovo's status as an autonomous region. UN Security Council involvement is usually justified in situations that constitute a "threat to international peace and security." However, this language was dropped from the Kosovo resolution after protests by Russia and China. The embargo imposed by the resolution will be lifted when Milosevic has made substantive steps toward granting greater autonomy to Albanians in Kosovo.

## Senate Indicates Readiness to Try Saddam Hussein as a War Criminal

The U.S. Senate in March adopted a non-binding resolution urging the United Nations to try Iraqi president

Saddam Hussein as a war criminal. Although the resolution is largely symbolic and a criminal tribunal for Hussein is unlikely in the near future, the 93-0 Senate vote reflects a growing discontent with what is perceived as the U.S. administration's inaction over continued defiance and oppression by Hussein.

# U.S. & E.U. Drop Support of China Human Rights Resolution

At the annual meeting of the UN Human Rights Commission, the United States and the European Union created both surprise and dismay by their announcement not to sponsor a UN resolution condemning human rights practices in China. The U.S. Administration has chosen instead to embrace what it considers positive recent changes in China. The Administration has noted recent releases of prominent political prisoners in China such as Wei Jingsheng. The Administration also seeks to build a positive framework for President Clinton's scheduled visit to China in June of this year. However, human rights groups have blasted the United States as abandoning one of its most effective tools for pressuring China to improve its human rights record.

## **US Seeking Deal to End Chinese Missile Sales**

The U.S. is reportedly negotiating a deal to grant China increased access to U.S. missile technology, in exchange for China ending its sale of weapons to Iran, Pakistan, and other nuclear-potential nations. China is also motivated by its desire to increase its lucrative business of launching private satellites. Many U.S. companies are also eager to gain access to Chinese launching capability. However, news of the deal is likely to encounter some skepticism in the U.S., in light of China's history of breaking restrictive promises on weapons-related sales under the Missile Technology Control Regime. It is also unclear whether China can effectively prevent the flow of missile technology from its borders.

#### FOREIGN & COMPARATIVE LAW

# **Sheinbeins' Extradition Proceedings in Israel**

Extradition proceedings will begin against Samuel Sheinbein, the 17-year-old who fled to Israel after being accused of murder in the United States. Sheinbein claims that he cannot be extradited because under Israel law, citizens may not be extradited. Israel law also provides that children of Israelis are automatic citizens, which is Sheinbein's basis of citizenship. Although the Israel government previously refused to extradite Sheinbein to the United States, its prosecutors now will argue that Sheinbein is not a citizen because his father improperly received his Israeli status. If the three judge panel does not agree with the prosecutors, Sheinbein will be tried in Israel. Currently, Sheinbein is in jail in Tel Aviv.

# Taxes Have Priority Over Wages Says Russian High Court

Until a decision by the Russian Constitutional Court last December, a company could delay paying taxes to the Russian federal government without being in direct violation of the law by citing payment of employee wages. This was due to a law specifying that employee wages should be paid before the payment of taxes. The court ruled that this law was unconstitutional and that Russian enterprises must pay their taxes before employee wages. Failure to do so would be a violation of the duty imposed by the Russian constitution to pay taxes, which constitute the Russian government's primary source of revenue.

# American Engineer Released by Russia Despite Espionage Charges

29-year-old American telecommunications technician, Richard Bliss, an employee of San Diego-based Qualcomm, Inc., was released from custody and allowed to return to the United States after being charged with committing espionage and illegally importing satellite equipment into Russia. Bliss had been using satellite positioning equipment in the southern Russian town of Rostov to locate transmission towers for a mobile phone system under a \$5.8 million contract between Qualcomm and the Russian cellular phone operator, AO Elektrosyaz. Bliss's arrest was one of 29 arrests of alleged foreign agents in Russia last year. There are conflicting reports as to whether Russia will require Bliss to return to face charges for which he could face up to 20 years in prison.

## **German Real Estate Tycoon Begins Prison Sentence**

Real estate tycoon, Jurgen Schneider, who fought extradition from the United States before voluntarily returning to Germany, has begun serving a sentence of six years and nine months in jail for fraud and document forgery convictions. He already had served a total of 32 months in jail in Miami while awaiting extradition. In what has been the biggest corporate fraud trial in Germany since World War II, Schneider was convicted of forging loan applications to deceive Germany's largest banks into lending him larger amounts than his projects warranted (U.S. \$137 million). The Frankfurt court judge also criticized the banks for reckless lending, as Germany's largest bank and Schneider's biggest creditor, Deutsche Bank, admitted to inexcusable errors in loan verification.

#### LAW OF THE SEA

## Saint Vincent & the Grenadines's Oil Tanker Released from Guinean Detention

The International Tribunal for the Law of the Sea ordered the prompt release of the M/V "Saiga," flying the flag of Saint Vincent and the Grenadines, and its crew from an approximately one-month detention by Guinea. The detention resulted from Guinea's claim that the tanker was engaged in smuggling activities off its coast and that Guinea's arrest of the tanker outside Guinean waters was an exercise of its right of hot pursuit. Saint Vincent and the Grenadines alleged that Guinea committed piracy. Evidence showed that the tanker was bunkering fishing boats in Guinea's coastal waters and supplying them with gas and oil. The Court also ordered Saint Vincent to deposit \$400,000 U.S. dollars as security until the dispute is settled in a Guinean court.

## **Ireland Steps Up Protection of Marine Environment**

New regulations to enhance Ireland's existing laws on pollution by noxious substances and by oil and ships' waste went into effect on January 1, 1998. The regulations apply to all Irish-registered ships and ships in Irish waters. Under these measures, foreign ships can be detained if necessary, substances hazardous to the marine environment must be properly bound, marked and certified, and ships must retain a special manifest of such substances and keep a copy ashore. Port state control under the 1991 Sea Pollution Act and the 1973 International Convention for the Prevention of Pollution from Ships (Marpol) are provided for under the new regulations.

# United States & Mexico Sign Boundary Agreement on Petroleum-Rich Gaps

On November 13, 1997 in Washington, D.C., the United States and Mexico agreed to set their exclusive economic zone (EEZ) borders at 200 nautical miles into the Gulf. This agreement enables both countries to negotiate division of mineral rights in the Gaps, two areas outside the 200-mile EEZs of each country.

#### New Bilateral Fisheries Agreement Between Japan & China

On November 17, 1997, Japan and China reportedly signed a new bilateral fisheries agreement to replace their 1975 bilateral fisheries treaty, after both countries last year ratified the United Nations Convention on the Law of the Sea. Negotiations are to continue regarding establishing their respective 200-mile exclusive economic zones (EEZs), provided for under the U.N. Convention. Both have agreed to establish a jointly controlled provisional sea zone in the East China Sea, to set fishing quotas in their respective EEZs, and to authorize control over illegal fishing to the country in whose waters such violations take place. Both countries also will establish a joint fisheries committee on controlling and managing fishing outside the provisional sea zone.



Current Developments

# PASSING THE FRENCH BAR EXAM— HOW A CALIFORNIA LAWYER BECOMES A FRENCH LAWYER

Therese Keelaghan, Avocat au Barreau de Marseille;
Attorney at law, State Bar of California
(c) Therese Keelaghan 1998
E-Mail: TKEELAGHAN@XAIX.PAGWAN.NET

arrived in Marseille from Los Angeles in 1990 after having practiced law for six years in California. I wanted to continue to practice law but to my misfortune, the law allowing foreign attorneys to practice as foreign legal consultants in France had been changed. If 1 wanted to practice law as an *avocat* (attorney) in France, I would be required to pass the French bar exam. This thought alone made my blood run cold. I quickly reviewed my options ...

## **Options**

A number of options are available to an American attorney. It is necessary to understand the practice of law in France to evaluate the available choices.

Historically, legal consulting and the drafting of legal documents was not regulated in France and only practice in court was regulated. Individuals, with or without a law degree, could call themselves a *conseil juridique* and counsel in the law. This possibility was used to great advantage by foreign, particularly Anglo-Saxon, law firms and accounting firms to establish an international practice in France counseling American businesses coming into Europe after World War II. Some regulation of the use of the title *conseil juridique* resulted from the law of December 31, 1971 but it was not until 20 years later that the regular and remunerated practice of counseling in the law was regulated. The law governing the practice of law in France was significantly changed by the Law of December 31, 1990.

Interestingly, the new regulations were made with the explicit intention not to create a monopoly in the practice of law to the benefit of lawyers, but rather to allow the continued practice of law by a number of professionals and organizations. As a result, the basic division that exists in the practice of law in France is between those practitioners who are legal professionals and those who are not.

#### Legal Professionals

Within the category of legal professionals, there are several distinct actors. Individuals who practice law as members of the organized Bar are called *avocats*. They have a monopoly over the practice of law in most

courts, although in some courts individual plaintiffs may appear in person or through in-house counsel. They may also counsel in the law and draft legal documents, however they do not have a monopoly in this area of practice.

Other legal professionals have roles in the practice of law in France which are distinct from the role of the lawyer and cannot be filled by lawyers. *Notaires* are members of the legal profession. They draft and authenticate documents for the transmission of property, other documents such as wills and marriage contracts, and collect the taxes due from these transactions that are owed to the government. *Avoues* are required to be used by lawyers to carry out the procedure at the Appeals Court level. Special lawyers also exist for appeals to the *Cour de Cassation*, the French equivalent of the U.S. Supreme Court. Several other professions—*huissiers*, bankruptcy administrators and representatives of creditors—practice law in specific situations.

Judges or magistrats are also members of the legal profession but are not *avocats*. They have usually studied either political science or law until obtaining the equivalent of a Masters Degree. They are then selected to attend the National School of the Magistrature in Bordeaux where they study to be a judge during three years. Upon graduation, they are appointed to the bench with life tenure.

These legal professions would not be open to American lawyers unless they were to qualify under the specific requirements applicable to each profession.

# Non-legal professionals

A number of non-legal professionals or organizations are authorized to consult and to draft legal documents on a regular and remunerated basis as an auxiliary to their profession.

Members of a "regulated" profession who are authorized to practice law include corporate auditors, certified public accountants, real estate agents and bank officials. These professions are allowed to consult in the law arising from their principal activities and to draft legal documents that are directly accessory to the services that they provide.

Members of certain "nonregulated" professions that require specific qualifications may also consult and draft legal documents, again relating to their principal activities. These include those professions covered by the French term *ingenierie* and includes financial, management and technical consulting. Certain associations that perform services for the government or for the public may also consult and draft legal documents in their specific area of competence. These include unions, professional associations and cooperatives.

The position of in-house counsel for a corporation also falls under this category. In-house counsel, or *juristes d'entreprise*, usually have a Masters degree in law but are unregulated by any professional code. They are not required to take a Bar exam and, in fact, are not allowed to be a member of a Bar because they are considered to lack the quality of "independence" required of members of the Bar. This position offers the most important opportunity to an American attorney to practice law outside of a law firm.

An even greater number of non-legal professionals or associations are allowed to be paid for legal consultation but can only draft legal documents if this service is free. These include law professors, certain governmental organizations, consumer, environmental, and other public service organizations. The unremunerated practice of legal consulting or drafting is unregulated.

There are a variety of possibilities available to American attorneys to practice law in France. The position of salaried employee is particularly interesting and there are numerous advantages, including five weeks of paid vacation per year! However, it may be difficult finding such employment, particularly outside of Paris. In the south of France, I found that neither businesses nor law firms needed the full-time services of an American attorney. Therefore, as I was not interested in any other profession, I had no other choice if I wanted to practice law but to qualify as an avocat.

# Is it Necessary to Take the Bar Exam?

In order to practice as an attorney in France, it is necessary to be a member of a French Bar Association

(*Barreau*). The Bar Associations in France are organized according to the territorial jurisdiction of the French equivalent to American Superior Courts (*Tribunal de Grande Instance*). There is usually one Bar Association for every large city. To be admitted to the Bar, a candidate must have the Certificate of Aptitude to the Profession of Attorney at Law (CAPA). This Certificate is given to successful candidates upon passing the French Bar exam.

It is possible to be exempted from passing the Bar exam. The most important exemption was voted by the European Union in 1997. It allows European attorneys who are European nationals and who have qualified in a member state of the E.U. to establish a law practice in any member state of the European Union without passing additional national bar exams.

Exemptions also exist for judges, law professors, notaries and other members of the legal professions in France, in-house counsel and bureaucrats holding high governmental positions who have been in these positions for a specified number of years. An exemption also applied to former *conseil juridique*. Under the law of December 31, 1990, former *conseil juridique* automatically became *avocats* without having to pass the French Bar exam. Under this law, the profession of *conseil juridique* was eliminated.

## **Admission to Take the Bar Exam**

At some point, it becomes apparent that taking the French Bar exam is inevitable. Remember, foreign lawyers coming to the United States must go through the same exercise.

The first official step is to request to the National Counsel of Bar Association ("CNB") to be allowed to take this exam. They must be provided with a number of documents including proof of nationality, a statement from a foreign Bar Association that the candidate is presently qualified as an attorney and copies of transcripts of legal studies, diplomas and publications. A non-French, non-European attorney must also prove reciprocity of treatment of French attorneys by the country or state in which they are qualified as an attorney. This means that in order for an attorney from California to be allowed to take the French Bar exam, it must be shown that French attorneys have the same opportunity to qualify to practice in California.

After a review of the candidate's file, the CNB will either authorize or refuse to authorize the candidate to take the exam. Dispensation from a part or all of the exam is possible and will depend upon the studies of the candidate, with a preference toward those candidates who have a diploma in International, European or Civil law studies, particularly if this diploma was given by a French university.

## **Exam Subjects**

The exam subjects are divided between written and oral exams. The written exam covers two major subjects.

The first subject is civil law which includes the law of property, torts, contracts, secured transactions and evidence. The candidate is free to choose the second subject of the written exam from four major topics: labor law, criminal law, administrative law and commercial law. I had chosen to be examined on commercial law. The oral portion of the exam covers five subjects: civil procedure, criminal procedure, administrative procedure, organization of the judiciary and professional ethics.

## **Preparation for the Exam**

French law students prepare for the Bar exam by following classes during one year at the Regional Center for Professional Studies ("CRFP"). They are accepted to this center after five to six years of legal studies leading to a Masters Degree in law. Preparation to take this entrance exam requires an additional year of university study and the success rate is 25%. During the year at the CRFP, they do an internship in a law firm and prepare a thesis, which must be presented as part of their bar exam. The bar exam taken by French lawyers includes oral argument and the written exams include a wider range of subjects.

I was allowed to follow the classes given at the CRFP, but I found that I needed to learn the fundamentals of French law on my own. The approach I found most useful was to learn French law by reading textbooks used by French law students. I did not find it useful to read books comparing American law to French law because I would be tested on my understanding of French law, not on the subject of comparative law. I worked with five

dictionaries to understand French legal terminology. Understanding and knowing how to use French codes was also indispensable.

At the end of this independent study, it was possible to follow an internship program in the various French courts which is part of the program at the CRFP. I was allowed to sit on the bench with the judges as an observer and to listen to deliberations. This experience was invaluable to understanding the French court system and procedure.

#### The Exam

After two years of independent study, I arrived in the morning for the written exam. A jury composed of three members of the legal professions—one judge, one faculty member and one representative of the Bar—write and grade the essay exams and conduct the oral exam. I was given three hours to write the *conclusions* (complaint) for a civil law case involving the professional liability of a *notaire*. In the afternoon, I had three hours to write a client memorandum on commercial law involving the sale of a business.

Three weeks later, the oral exam was composed of two parts: a twenty minute expose after a one hour preparation of a subject on procedure, followed by a fifteen minute discussion with the jury on the subject of Professional Responsibility. I was given the subject "Discuss Article 16 of the New Code of Civil Procedure." During thirty minutes I spoke to the three members of the jury, dressed in the formal robes of their profession, who later questioned me on the law and ethics. After all of the oral exams were concluded, a member of the jury came out of the exam room and gave the names of the candidates who passed and those who failed. Not all of us passed ... Those who wanted to try again would be given two more chances to pass the exam.

Because I qualified to take the exam as a foreign attorney, I was able to open my law office immediately after being admitted to the Bar. This is not the case for new French lawyers who are required to follow an internship during two years in a law office before they are allowed to practice law independently. I feel reassured in my knowledge of French law by having passed the Bar exam. My admission to the French Bar means that I am may appear in court, consult in the law and draft legal documents as an *avocat*. The independence that this allows me is the greatest reward of all.



Current Developments

# **OTHER ACTIVITIES OF INTEREST**

- ABA-ILEX (in the U.S.)
- Summer Law Institute in Mexico
- World Lawyers to Meet in Canada for International Bar Association Conference

## ABA-ILEX (in the U.S.)

June 15-17, 1998; Washington, D.C. June 18 - 20, 1998; New York

ILEX Briefing Trips Come to the United States! The International Legal Exchange (ILEX) program will host its first ILEX Briefing Trip to the United States this spring. The U.S. Briefing Trip is designed to meet the professional interests of non-U.S. based lawyers by providing opportunities to learn about doing business in the United States and with international organizations. The many substantive briefings and seminars will be complemented by numerous social events providing ample networking and relationship building opportunities.

In Washington, activities include visits with Congressional leaders on Capitol Hill, examination of the Executive Branch (with an emphasis on trade matters), briefings at the World Bank and other international financial institutions, and activities that will focus on learning about the American judiciary system. Participants will also meet with leaders of the ABA and the Section of International Law and Practice.

In New York, participants will visit and examine the New York Stock Exchange firsthand, attend briefings at the American Arbitration Association, meet with representatives of the United Nations and other affiliated international agencies, and attend receptions and other social events hosted by prominent U.S. law firms.

Who should participate? Lawyers residing and working outside the United States, and lawyers in the United States who are looking to tap into new business opportunities. For more information, contact Edison W. Dick, Chair, ILEX Committee, (202) 393-7122, fax (202) 347-9015, ilexewd@aol.com, or Jesus V. Izquierdo, International Projects Administrator, (202) 662-1670, fax (202) 662-1669, jizquierdo@staff.abanet.org.

#### SUMMER LAW INSTITUTE

June 7-July 18, 1998 Guanajuato, Mexico

A consortium of the law schools of the University of New Mexico, Universidad de Guanajauto, Southwestern University, and Texas Tech, in cooperation with the University of New Mexico Latin American Institute, will offer six weeks of summer law study in Guanajuato, Mexico. Courses focus on Mexican law and legal subjects related to Latin America. All courses are either in English or in Spanish with English interpretation. For further

information, please contact Theo Crevenna, The University of New Mexico, Summer Law Institute, (505) 277-2961, fax (505) 277-5989, crevenna@unm.edu

## WORLD LAWYERS TO MEET IN CANADA FOR INTERNATIONAL BAR ASSOCIATION CONFERENCE

September 13-18, 1998

Vancouver, British Columbia, Canada

International law firm mergers, cybercrime, and the legal issues surrounding human organ transplant are among the many topics planned for discussion at this year's International Bar Association Conference in Canada.

Lawyers drawn from throughout the IBA's 183-country membership will attend the September 13–18 event, which will include working programs from the 55 specialist Committees of the Association's three Sections—on Business Law, General Practice and Energy and Natural Resources Law.

Some 3,000 lawyers are expected to sign up for the week-long Conference, which will be held at the Vancouver Trade and Convention Centre (VTCC) and the city's Waterfront Hotel.

The specialist Committees meeting at the Conference will cover topics in every conceivable practice area, with the working program addressing a broad range of subjects from partner development and the future of trade unions, to miscarriages of justice and insolvency law.

All topics will be viewed on a multi-jurisdictional basis by acknowledged experts from both legal and non-legal backgrounds, and in addition to hosting Committee working sessions, the Conference—the Association's 27th Biennial event—will also provide a forum for meetings of the IBA's Subcommittees, Working Groups, Steering Groups and Fora.

#### **Additional Activities**

The Conference program also includes an opening day Plenary Session on The Right to Work, and a one-day training course in the Fundamentals of International Business Practice. The course, previously held in Johannesburg, Mexico, Paris, Berlin, Buenos Aires, Caracas and New Delhi, will run throughout the day preceding the Conference. Organized by the SBI, Standing Committee on Professional Development, the course will be open free of charge to all young lawyers.

Led by Standing Committee Chairman Bernard L. Greer, Jr., senior business lawyers from around the world will provide on-location training in a range of business law subjects.

For more established lawyers an informal discussion group headed by former SGP Chairman David Andrews will meet on Tuesday, September 15, to consider whether the legal profession and the IBA itself is making full use of its senior members, and a General Interest Program also will be provided for delegates and non-lawyer guests on the opening day of the event.

The program, Breaking the Cycle: Domestic Violence–Societal Violence, will see a panel of experts in the fields of education, sociology and psychology, leading participants in a discussion on the effects of physical, emotional or psychological violence on individuals and families.

A number of social events will also run tandem to the week's working program, providing delegates with the opportunity of both networking and visiting some of Vancouver's most popular sights. Among the venues hosting IBA events this year are the Capilano Suspension Bridge, the Vancouver Yacht Club, and the Plaza of Nations.

## Free IBA Membership

Non-members who take a full registration for the Conference will receive free membership of the IBA and one Section until the end of 1999, and the SBL is also offering a limited number of Conference scholarships to lawyers from North, Central and South America, as well as the Caribbean nations.

For further information about the International Bar Association 1998 Conference you can approach your own Bar Association or Law Society, or contact IBA direct at 271 Regent Street, London, United Kingdom, W1R7PA, tel. 44 (0) 171 629-1206, fax 44 (0) 171 409-0456.



# **SECTION NEWSLETTER**

- Advertising Information
- Subcommittee Chairs
- Check Out our Home Page!
- Newsletter Editor and Contacts

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The chairs listed below have substantial experience with the Section's activities in the areas specified, and interested members should contact them with any comments or questions. Suggestions to add subcommittees or change activities of the present subcommittees should be directed to the Section Chair, David Hirson.

- Immigration Law David Hirson
- Legislation Keith E. Pershall
- Membership Majda Barazutti
- Newsletter Thomas A. Bennett
- Practitioner Michael R. Tyler
- Programs Michael Tyler
- Relations with Foreign Bars Fred Rodriguez
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These positions are current for 1997/1998 term. For contact information see Executive Committee.

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Questions or comments may be directed via e-mail to Margaret Hastings-Hale, Sacramento, (916) 321-4500, fax (916) 321-4555, mhh@ns.net.

#### **EDITOR & CONTACTS**

**Editor-in-Chief:** Thomas R. Bennett **Associate Editor:** John R. Walton

Current Developments Editor: John J. Stifter

Calendar Editor: John R. Walton

Please address correspondence to: Attn: Ms. Pres Soberon, International Law Section, The State Bar of California, 555 Franklin Street, San Francisco, CA 94102-4498

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